In the Supreme Court of Georgia

Decided: APR 21 1982

38278. JOSEPH WILSON, JR. v. WALTER D. ZANT, SUPT.

HILL, Presiding Justice.

The defendant, Joseph Wilson, Jr., was convicted of murder, kidnapping with bodily injury and possession of a firearm during the commission of a felony. His convictions and death sentence for murder, life sentence for kidnapping with bodily injury and five year sentence for possession of a firearm were affirmed on direct appeal by this court in Wilson v. State, 246 Ga. 62 (268 SE2d 895) (1980), cert. denied, 449 U. S 1103. The defendant then filed a petition for a writ of habeas corpus, alleging various violations of his constitutional rights. After a hearing, the habeas court set aside the possession of a firearm conviction but denied further relief. We granted the defendant's application for certificate of probable cause to appeal and defendant enumerates six errors.[1]

We quote the facts from our earlier decision in this case (246 Ga. 62-63): "From the presentation of the evidence the jury was authorized to find the following: The defendant, Joseph Wilson, Jr., and the victim George A. Knox, and the victim's girl friend, Patty Johnson, were involved one to another or all together in some sort of drug deal.

"On the evening of February 23, 1979, the defendant told two witnesses that he was going to blow the victim away. At about 9:45 p.m. that night the defendant abducted the victim

[1]Although Wilson appears as the petitioner in this habeas corpus case, he will be identified as the defendant for the purposes of this opinion.

at gunpoint from Patty Johnson's house in Cobb County. The victim was in the house with Ms. Johnson and two of his friends when the defendant entered the house carrying a 12-gauge, sawed-off shotgun. He pointed the gun at the victim and said something to the effect that 'You set me up' or 'You put the heat on me.' The victim denied the allegation. The two friends, David and Kenneth Burns, attempted to leave but the defendant pointed the shotgun at them. After being assured that these two knew nothing, the defendant permitted them to go. The defendant again pointed the shotgun at the victim and said, 'Let's go.' The victim attempted to take his jacket and a chain that he carried, allegedly for protection, but was told he wouldn't need them. The defendant and the victim left the house in the defendant's truck. The Burns brothers saw them come out of the house. Later that night the defendant talked with Ms. Johnson over the telephone and told her that the victim had been 'taken care of.' The defendant told her to get rid of the victim's jacket.

"The victim's body was found the next morning in a field in Forsyth County. He had been shot by a 12-gauge shotgun blast between the eyes at close range. The evidence at the scene indicated that the body was found where the shooting occurred. A neighbor testified that she heard a shot at about 1 a.m. There were no other wounds on the body. The defendant was subsequently arrested, indicted, tried, and based primarily upon the testimony of Patty Johnson, David and Kenneth Burns and the investigating officers, was convicted of the murder of George A. Knox, the kidnapping with bodily injury of George A. Knox, and possession of a firearm during the commission of a crime. . . . The evidence was sufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979)."

The following additional facts are pertinent to our

consideration of this appeal. Patty Johnson was acquainted with and identified the defendant; although unable to positively identify the defendant, the Burns brothers corroborated her testimony. All three of these witnesses stated that the victim's abductor was driving a pickup truck with a peculiar ladder arrangement attached to the rear. After interviewing witnesses at a party who said that the defendant was looking for and threatening to shoot the victim on the evening in question and after interviewing Patty Johnson and the Burns brothers, the police obtained a warrant for the defendant's arrest.

The defendant was arrested at his home at approximately 6:30 a.m. on February 27, 1979, read his Miranda [v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966)] rights and transported to the Forsyth County Sheriff's Department where he was held until approximately 8:00 a.m. The defendant was then questioned by Sergeant J. C. Adams. At trial, Sergeant Adams testified that sometime between his arrest and the interrogation the defendant stated that he "would like to have an attorney." However, an attorney was not provided and after again being advised of his Miranda rights and signing a written Miranda acknowledgment and waiver form, the defendant gave a statement to police.

In his statement to police, the defendant denied committing the crimes and claimed alibi. He admitted looking for the victim at the party on February 23, allegedly because the victim owed him money and was supposed to meet him there to repay it, and admitted threatening at that time to "kick [the victim's] ass" for failing to be at the party to repay the loan. However, he denied threatening to blow the victim away. He stated that he had been at home with his family at the time the victim was killed.

Under further questioning, the defendant denied owning a shotgun and said that the only gun he owned was a toy "tin-can alley" gun which he had given to his children. He

admitted that he drove a truck similar to the one described by Patty Johnson and David and Kenneth Burns as driven by the man who entered the Johnson residence with a shotgun and informed police that the truck belonged to his business partner, David Shaffer. Subsequently, the police interviewed David Shaffer in connection with the truck and learned from him that the defendant had recently purchased a shotgun from Joseph Evankovech.

At trial, witnesses for the state related to the jury most of the defendant's statement to police.[2] The state also introduced the toy gun to show that it could not have been the gun the defendant had been seen with on prior occasions or the gun which was used to abduct the victim. Further, the state elicited testimony from Shaffer and Evankovech that the defendant did in fact own a shotgun and introduced photographs of the truck driven by the defendant.

After the state presented its case, the defendant took the stand and testified to essentially the same facts contained in his statement to police except that he admitted purchasing a shotgun from Evankovech.[3] At the sentencing phase of the trial, the defendant again took the stand and at this point admitted that on the evening of February 23, he went to the Johnson home and pointed a shotgun at the victim. He admitted that the victim accompanied him out of the house but testified that once outside, a truck drove up and two men forced the victim inside the truck at gunpoint. These men, he speculated, must have been the ones who

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[2]The trial court determined in a Jackson v. Denno [378 U. S. 368 (84 SC 1774, 12 LE2d 908) (1964)] hearing that the defendant's statement was "knowingly, freely, willingly, and voluntarily made." The statement itself was not offered into evidence.

[3]There is no threshold showing here, as there was in Harrison v. United States, 392 U. S. 219, 222-24 (88 SC 2008, 20 LE2d 1047) (1968), that the defendant was impelled to take the stand by the admission of his statement to police.

murdered the victim.

1. The defendant first contends that the introduction at trial of the statement he gave to police during custodial interrogation after he had requested an attorney but before one was provided (and the introduction of the "fruits" derived by police from his statement, namely the toy gun and the testimony of Shaffer and Evankovech) violated his fifth, sixth and fourteenth amendment right to counsel as defined in the recent United States Supreme Court case of Edwards v. Arizona, ____U. S.____ (101 SC 1880, ____LE2d____) (1981).

The habeas court found that the defendant had properly invoked his right to counsel, that the police had subsequently initiated custodial interrogation before counsel was present and, therefore, concluded that the defendant's resulting statement should not have been admitted at trial, relying on Edwards v. Arizona, supra, 101 SC 1880, decided after defendant's trial. However, the habeas court also found that the statement was not a confession, that it had been used for impeachment purposes only, and that its erroneous admission was harmless beyond a reasonable doubt. In response to the defendant's argument that the toy gun and the testimony concerning his ownership of a shotgun should have been excluded as "fruit of the poisonous tree," the habeas court found that the toy gun had been used only for impeachment purposes and that the testimony about the shotgun was not obtained as the result of the defendant's statement. Thus, the habeas court declined to grant relief on this issue.

Accepting that Edwards v. Arizona, supra, established a per se exclusionary rule (but see the concurring opinion of Powell, J., 101 SC at 1887-1889), we therefore find that the defendant's statement, given pursuant to police initiated custodial interrogation after the defendant had invoked his right to counsel, was inadmissible at trial during the state's case in chief.

This conclusion, however, does not end our inquiry, and we now address the final question in habeas corpus: whether the error was harmful. See McDuffie v. Jones, 248 Ga. 544, 545-46 (SE2d) (1981). We recognize that it is error to admit statements obtained in violation of Miranda v. Arizona, supra, whether such statements constitute confessions, incriminating admissions or exculpatory statements (384 U. S. at 476-477). However, for purpose of determining the harmful or harmless nature of the error, whether a defendant's statement is exculpatory or incriminating is material. Here we deal with exculpatory statements to police admitted into evidence.

The evidence for the state showed that the defendant was looking for and threatening to kill the victim, that he found the victim and abducted him at the point of a shotgun, that the victim was murdered with a shotgun, and that the defendant impliedly admitted to Patty Johnson that he had killed the victim. We find no reasonable possibility that the admission of defendant's exculpatory (alibi) statements to police might have contributed to the conviction and therefore find that the admission of his statements was harmless beyond a reasonable doubt. Schneble v. Florida, 405 U. S. 427, 432 (92 SC 1056, 31 LE2d 340) (1972); Chapman v. California, 386 U. S. 18, 23-24 (87 SC 824, 17 LE2d 705) (1967); McDuffie v. Jones, supra, 248 Ga. at 546, fn. 3.

The defendant contends that three items of evidence used by the state at trial were obtained directly as the result of his statement to police and, therefore, were "fruit of the poisonous tree", see Harrison v. United States, supra (fn. 3), which should have been excluded at trial. The items are photographs of the defendant's truck,[4] the toy gun, and testimony that the defendant owned a shotgun. The

[4]The defendant claims for the first time on appeal that the photographs of the truck were obtained as the result of his statement.

defendant's argument is based upon the premise that evidence obtained as a result of statements taken in violation of Edwards v. Arizona, supra, are subject to the "exclusionary rule". See Weeks v. United States, 232 U. S. 383 (34 SC 341, 58 LE 652) (1914); Mapp v. Ohio, 367 U. S. 643 (81 SC 1684, 6 LE2d 1081) (1961); Silverthorne Lumber Co. v. United States, 251 U. S. 385 (40 SC 182, 64 LE 319) (1920).

However, the United States Supreme Court has never extended the exclusionary rule to the "fruit" of a Miranda-tainted statement. In Michigan v. Tucker, 417 U. S. 433 (94 SC 2357, 41 LE2d 182) (1974), the Court held that the "fruit" of a statement procured by police when the defendant had not been advised of his right to appointed counsel did not fall within the ambit of the exclusionary rule. However, the Court placed considerable emphasis on the fact that the statement was obtained prior to the Miranda decision and the majority expressly declined to resolve the question of whether the holding applied to post-Miranda cases. See Michigan v. Tucker, supra, 417 U. S. at 447.

We understand Edwards to be an application of the prophylactic rules of Miranda. A distinction is drawn between police conduct which infringes directly upon an accused's constitutional rights and conduct which violates only the prophylactic rules developed to protect those rights. The "fruit" of a statement which was obtained in violation of a constitutional right must be suppressed, Wong Sun v. United States, 371 U. S. 471, 484-85 (83 SC 407, 9 LE2d 441) (1963); see also United States v. Crews, 445 U. S. 463, 470 (100 SC 1244, 63 LE2d 537) (1980), but the "fruit" of a statement obtained in violation of a prophylactic rule is not automatically subject to the exclusionary rule. See Michigan v. Tucker, supra, 417 U. S. at 439, 446-52; United States ex rel. Hudson v. Cannon, 529 F2d 890, 892-95 (7th Cir. 1976).

We are aware that the First Circuit has recently held that the "fruits" of an Edwards-tainted statement must also be excluded at trial. United States v. Downing, 665 F2d 404, at 407-09 (1st Cir. 1981).[5] However, in a concurring opinion in Michigan v. Tucker, supra, Justice White stated that he would hold that the exclusionary rule does not apply to the "fruit" of a voluntary but Miranda-tainted statement. See Michigan v. Tucker, supra, 417 U. S. at 460-61 (White, J., concurring).

With respect to an unresolved constitutional question, when faced with choosing between extending the exclusionary rule or following Justice White's view in Michigan v. Tucker, supra, we adopt the latter. See Oregon v. Hass, 420 U. S. 714, 719 (95 SC 1215, 43 LE2d 570) (1975); Fare v. Michael C., 439 U. S. 1310, 1314 (Rehnquist, Circuit Justice 1978). We therefore hold that the exclusionary rule does not apply to evidence derived from a voluntary statement[6] obtained in violation of Edwards v. Arizona, supra, and that it was not error to admit the "fruits" of the defendant's statement in this case.

2. The defendant was convicted of murder (Code § 26-1101) and possession of a firearm during the commission of a felony (Code § 26-9908a) (as well as kidnapping with bodily injury), all arising out of the abduction and death of the victim. The habeas court set aside the conviction for possession of a firearm during commission of a felony "because the weapon possessed was the same one used in the commission of the murder [and, therefore,] the offense of possessing the deadly weapon during the commission of a felony (the murder) would be an included offense under Ga. Code Ann. § 26-506, and [the defendant] cannot be convicted

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[5]The Fifth Circuit apparently has not finally decided this issue. United States v. Brookins, 614 F2d 1037, 1040 fn. 1 (5th Cir. 1980).

[6]See footnote 2 above.

and sentenced for both the greater and lesser offenses. State v. Estevez, 232 Ga. 316 (1974)."

In his second enumeration of error the defendant urges that his murder conviction, not his conviction for possession of a firearm, must be set aside because here, he argues, murder is the lesser included offense of possession of a firearm during the commission of a felony in that murder was established by proof of less than all the facts required to prove the possession offense. See Haynes v. State, ___Ga.___ (No. 37825, decided Jan. 5, 1982) (Marshall, J., dissenting). Because successive prosecutions are not involved, this enumeration presents an issue in regard to the substantive, as opposed to the procedural, prong of double jeopardy. See State v. Estevez, supra, 232 Ga. at 317.

There is no question that convictions for both murder and possession of a firearm during the commission of a felony are not constitutionally prohibited, even when the felony relied on for the possession conviction is the murder, because the two offenses, Code §§ 26-1101, 26-9908a, have distinct statutory elements. See Illinois v. Vitale, 447 U. S. 410, 416 (100 SC 2260, 65 LE2d 228) (1980); Blockburger v. United States, 284 U. S. 299, 304 (52 SC 180, 76 LE 306) (1932); Kowalski v. Parratt, 533 F2d 1071 (8th Cir. 1976), cert. denied, 429 U. S. 844; Michigan v. Brintley, 406 Mich. 374 (280 NW2d 793) (1979), appeal dismissed, 444 U. S. 948; Haynes v. State, supra (Marshall, J., dissenting).

However, as we have previously noted, our statutory, substantive double jeopardy provisions, Code Ann. §§ 26-505, 26-506, have expanded the proscription against multiple punishment for the same conduct beyond that required by the United States and Georgia Constitutions. State v. Estevez, supra, 232 Ga. at 317. Thus, in Estevez we applied the "actual evidence" test for resolving substantive double

jeopardy questions instead of the less restrictive "required evidence" (or distinct statutory elements) test which is the constitutional minimum. Illinois v. Vitale, supra; see Haynes v. State, supra (Marshall, J., dissenting). Using the "actual evidence" test, we have held that the offense of posession of a firearm during the commission of a felony merges into the felony upon conviction for both. Chumley v. State, 235 Ga. 540 (2) (221 SE2d 13) (1975); Roberts v. State, 228 Ga. 298 (2) (185 SE2d 385) (1971).

Yet even our expanded double jeopardy protections must be interpreted in light of the General Assembly's intention in enacting sanctions against criminal conduct. State v. Estevez, supra, 232 Ga. at 318. In 1976, the General Assembly amended Code Ann. § 26-9908a, the Code section which defines the offense of possession of a firearm during the commisison of a felony. The amendment provides: "Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense." Ga. L. 1976, pp. 1591, 1592. Thus, there is express legislative intent to impose double punishment for conduct which violates both Code Ann. § 26-9908a and other felony statutes. As we have already noted, such double punishment is not constitutionally prohibited.

We therefore hold that it does not violate our double jeopardy statutes to convict a person of both possession of a firearm during the commission of a felony and the accompanying felony in a single prosecution.[7] The contrary holdings in Brown v. State, 247 Ga. 298 (8) (275 SE2d 52) (1981), and High v. State, 247 Ga. 289 (12) (276 SE2d 5)

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[7]The state has not filed a cross appeal as to the habeas court's setting aside of the defendant's conviction for possession of a firearm. Thus, even though we hold that it was not necessary to set aside that conviction, we do not reinstate the conviction for possession of a firearm during commission of a felony.

(1981), both of which were decided after the 1976 amendment to Code Ann. § 26-9908a but relied on the pre-amendment cases of Chumley and Roberts, supra, are overruled. See also Jackson v. State, 143 Ga. App. 406 (2) (238 SE2d 752) (1977), and Whitehead v. State, 144 Ga. App. 836 (3) (242 SE2d 754) (1978). It follows that murder is not a lesser included offense under the crime of possession of a firearm during commission of a felony and that this enumeration of error is without merit.

3. The defendant next contends that the trial court's instructions to the jury on the elements of intent and malice created unconstitutional presumptions under Sandstrom v. Montana, 442 U. S. 510 (99 SC 2450, 61 LE2d 39) (1979).

In Sandstrom, the Supreme Court held that the charge, "the law presumes that a person intends the ordinary consequences of his voluntary acts," was unconstitutional because the jury may have interpreted the presumption as either mandatory (as opposed to permissive) or as shifting the burden of persuasion on the issue of intent to the defendant. Both of these interpretations violate the fourteenth amendment requirement that the state prove every element of a crime beyond a reasonable doubt. See Sandstrom v. Montana, supra, 442 U. S. at 524; Blankenship v. State, 247 Ga. 590, 592 (277 SE2d 505) (1981). Thus, under Sandstrom, two inquiries must be made: (1) is the challenged presumption mandatory or permissive; and (2) even if the presumption is merely permissive, does it shift the burden of persuasion to the defendant on an element of the crime charged.

The relevant portion of the trial court's charge in this case is set out below. The defendant enumerates error as to the underlined portions.

"Mr. Joseph Wilson enters upon the trial of this case with a presumption of innocence in his favor. This presumption remains with him until he is proved guilty. No

person shall be convicted of a crime, or crimes, unless each element of that crime, or those crimes, are proved beyond a reasonable doubt.

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"Now you must keep in mind that because the defendant is presumed to be innocent, and because the State must prove the guilt beyond a reasonable doubt, that the defendant has no burden of persuasion in the case.

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"Now malice as defined in the element of murder, is a state of mind, and frequently must be proved indirectly. It is an element of the crime of murder with malice aforethought and therefore must be proved by the state beyond a reasonable doubt. Implied malice also must be proved by the State. All the circumstances of the killing must show an abandoned and malignant heart. The State must so prove beyond a reasonable doubt.

"Now, malice, as used in this definition of murder--either express or implied--is an essential element and ingredient of the offense of murder. As I have said, the burden is on the State to show malice, express or implied, beyond a reasonable doubt.

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"If a person is kiled by another, by an instrument, in the manner in which it was used was one likely to produce death, and at the time of the killing there were no circumstances such as to excite the fears of a reasonable man that he was in danger from the deceased, then the law will imply malice on the part of the defendant, and you would be authorized to find him guilty of murder, as charged in the indictment.

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"Another essential element of the offenses charged is that of intention. Intent to commit these crimes charged in

each and every count is an essential element the State must prove beyond a reasonable doubt. . . .

"Intent may be inferred from proven circumstances, or, as I have said, by acts, conduct, demeanor and motive, or it may be presumed, when it is the natural and necessary consequences of the act for which the defendant is being prosecuted."

Clearly the challenged instructions on malice and intent did not shift the burden of persuasion on those issues to the defendant. The jury was explicitly instructed that the state had the burden to prove both elements beyond a reasonable doubt. Thus, we find no violation of the second prong of Sandstrom. See, e.g., Lackey v. State, 246 Ga. 331, 338-39 (271 SE2d 478) (1980).

Turning now to the first prong of Sandstrom, we find that the trial court's charge on intent created a permissive, not a mandatory, inference or presumption. A presumption is mandatory, and unacceptable under Sandstrom, if it "tells the trier of fact that 'he or they must find the ultimate fact upon proof of the basic fact.' Williamson [v. State, 248 Ga. 47, 54 (281 SE2d 512) (1981)], citing Ulster County, New York v. Allen, 442 U. S. 140, 157 (99 SC 2213, 60 LE2d 777) (1979). A permissive presumption or inference, on the other hand, is one which 'allows--but does not require--the trier of fact to infer the [ultimate] fact from proof by the prosecutor of the basic [fact].' Williamson, supra, at 54, citing Ulster County, New York, supra, at 157." Davis v. State, ___Ga.___ (No. 38313, decided April 6, 1982). Here, the jury was instructed that under certain circumstances "intent may be inferred . . . or it may be presumed. . . ." [Emphasis supplied.] Thus, the charged presumption on intent was permissive and did not violate the defendant's right to due process. Davis v. State, supra.

The challenged charge on malice presents a more

difficult problem, however, as it contains the language "the law will imply malice." We cautioned against the use of similar language in Hosch v. State, 246 Ga. 417 (3) (271 SE2d 817) (1980) (decided after the defendant's trial and convictions).

The charge at issue in Hosch provided: "I charge you that the law presumes that a person intends to accomplish the natural and probable consequences of his act, and if a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily used and thereby causes the death of a human being, the law presumes the intent to kill. These presumptions may be rebutted." We held that this charge did not create unconstitutional mandatory presumptions because the jury was expressly instructed that the presumptions could be rebutted. Hosch v. State, supra, 246 Ga. at 419.

In contrast with Hosch, the charge in this case did not indicate to the jury that the implication of malice could be rebutted. Further, nowhere in the trial court's instructions was the jury informed as to the rebuttable nature of presumptions generally. Thus, the jury might have interpreted this charge on implied malice to require an inference of malice if the evidence showed that the victim had been killed with a deadly weapon (here, a shotgun), unless extenuating circumstances were shown. If the jury understood the presumption as being mandatory, the state was relieved of its burden of proof on an essential element of the crime of murder and the defendant's right to due process of law was violated.[8] Sandstrom v. Montana, supra; Hosch v. State, supra, 246 Ga. at 420-21.

Again, however, the finding of error does not end our inquiry. Under certain circumstances, even Sandstrom errors

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[8]In finding that this charge may violate due process, we necessarily overrule the pre-Sandstrom case of Hill v. State, 239 Ga. 836 (239 SE2d 21) (1977).

may be found harmless beyond a reasonable doubt. Mason v. Balkcom, 669 F2d 222 [7] (5th Cir., 1982).[9] Therefore, we next consider whether the charge contributed to the defendant's conviction for murder.

The situation we are confronted with here is very similar to the one presented in United States v. Reeves, 594 F2d 536 (6th Cir. 1979), cert. denied, 442 U. S. 946. In Reeves, the defendant was charged with bank robbery and convicted despite his defense that "he was not the person who did it." On appeal, the Sixth Circuit found that the trial court's instructions on intent shifted the burden of proof on that issue to the defendant. However, the court determined that under these facts the erroneous charge was harmless. "[I]n this case the criminal intent of the person who robbed the bank was never placed at issue. Appellant's defense was simply that he was not the person who did it. This issue was clearly presented to the jury with the burden of proof beyond a reasonable doubt placed squarely upon the government. More than adequate evidence to support the jury verdict was presented. . . . Under these circumstances, we find the error in the charge to be harmless beyond a reasonable doubt." United States v. Reeves, supra, 594 F2d at 538.

Similarly, in this case the charge at issue related to malice, the intent element of murder. See Code Ann. § 26-1101(a). The defendant's sole defense in the guilt phase of the trial was alibi. No issue was raised that the victim, who was killed in a deserted field about 1 a.m. by a shotgun blast to the head from a distance of five feet, was not intentionally murdered. Rather, the defendant contended

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[9] Indeed, in Sandstrom itself, after the United States Supreme Court concluded that the trial court's charge on intent could have been interpreted as creating either a burden-shifting presumption or, as here, a conclusive presumption, the Court stated that the Supreme Court of Montana was free to consider the issue of harmless error on remand. Sandstrom v. Montana, supra, 442 U. S. at 526-27.

that he was not the person who committed the murder.

In connection with the defendant's alibi defense, the jury was instructed that the state had the burden to prove the identity of the defendant as the perpetrator of the murder and his presence at the scene of the crime beyond a reasonable doubt. And, as we noted in the direct appeal of the case, the evidence adduced by the state was sufficient beyond a reasonable doubt to support the jury's verdict. Wilson v. State, supra, 246 Ga. at 63.

We adopt the reasoning of the Sixth Circuit in Reeves,[10] and hold that under the facts of this case, the trial court's charge on malice was harmless beyond a reasonable doubt.

4. The defendant also asserts as error the prosecutor's comments to the jury during closing argument concerning the defendant's failure to produce certain witnesses who allegedly would have given favorable testimony. The defendant recognizes the rule in Georgia is that such comments by a prosecutor are permissible. See Shirley v. State, 245 Ga. 616 (1) (266 SE2d 218) (1980); Contreros v. State, 242 Ga. 369 (3) (249 SE2d 56) (1978).[11] However, he argues that this violates his rights to due process and equal protection because under another rule the defendant is not permitted to comment on the state's failure to produce certain witnesses. See Brown v. State, 150 Ga. App. 831 (2) (258 SE2d 641) (1979), cert. denied; Gannaway v. State, 142 Ga. App. 87 (2) (235 SE2d 392) (1977). The latter rule was not applied to this defendant.

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[10] See also United States v. Frady, ____U. S.____ (50 USLW 4388, 4393-94) (1982); Mason v. Balkcom, supra, at [7].

[11] "Although the prosecutor is prohibited from commenting on the defendant's failure to testify, the prosecutor can argue to the jury the inferences to be drawn from the defendant's failure to produce witnesses, who are competent to testify and who allegedly would give evidence favorable to the defendant." [Cits. omitted.] Shirley v. State, supra, 245 Ga. at 618.

Pretermitting the question of standing, we view this argument as presenting only an issue under the equal protection clauses of the United States and Georgia Constitutions. Because no fundamental right or suspect classification is involved, the disparity between the two rules must only meet the rational relationship test. See generally San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 55 (93 SC 1278, 36 LE2d 16) (1973); McDaniel v. Thomas, 248 Ga. 632, 638-39 (SE2d) (1981).

In closing argument, both the prosecution and the defendant are permitted to argue "reasonable deductions" from the evidence. See, e.g., Jordan v. State, 247 Ga. 328, 349 (276 SE2d 224) (1981). Notwithstanding the fact that the burden of proof is upon the state, it is merely a truism to say that a person charged with a criminal offense will put before the jury evidence to corroborate his innocence or create a reasonable doubt if such evidence is available. Thus, when the prosecution comments on the defendant's failure to produce purportedly favorable evidence, it is urging the jury to make the reasonable deduction that there exists no such favorable evidence.

In contrast, it is not resonable to infer that the state's failure to produce all available inculpatory witnesses means that their testimony would not have been inculpatory or would have been exculpatory. For example, assume there are numerous eyewitnesses to a shooting, that all can testify that the shooting occurred and that some can identify the defendant as the assailant. For a variety of reasons, the state might choose to call only some of the witnesses at trial, even though the others if called would have given corroborating testimony against the defendant. It is not reasonable to infer from the fact that there were uncalled eyewitnesses, that the uncalled eyewitnesses would have exonerated the defendant. Although there might be

exceptions to the rule that defense counsel cannot comment on the prosecutor's failure to produce witnesses depending upon the facts of a particular case, this rule was not invoked against this defendant. We therefore find no equal protection violation here on the face of the two rules because there is a rational reason for the disparity between them.

5. At the conclusion of the arguments during the sentencing phase of the defendant's trial, the jury was charged as follows:

"Members of the Jury, the defendant in this case, Joseph 'Joey' Wilson, Jr., having been found guilty of the offense of murder, it is now your duty to determine the penalty which shall be imposed as the punishment for that offense.

"The law provides that in all cases in which the death penalty is sought, and is authorized by the law, that the Judge shall give to the jury instructions regarding aggravation and mitigating circumstances.

"Now in this case the State of Georgia contends that the offense of murder, and one of the aggravating circumstances under our law is that the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, being the kidnapping of the person of George A. Knox, resulting in bodily injuries to George A. Knox.

"The State has the burden of proving this aggravating circumstance beyond a reasonable doubt. Now if you members of the jury find beyond a reasonable doubt that the offense of murder of George A. Knox was committed under the foregoing aggravating circumstance that I just read to you, you may, if you see fit, recommend that this defendant, Joseph 'Joey' Wilson, Jr., be put to death.

"The form of your verdict for such a recommendation would be: 'We fix the penalty as death.' If you recommend the death penalty, you must also add to your verdict: 'We

find the following aggravating circumstance,' and you would write out the aggravating circumstance that you find beyond a reasonable doubt.

"You must set it forth in writing. It must be signed by your Foreman. The aggravating circumstance that you have found to exist beyond a reasonable doubt. If you do add the foregoing recommendation, then this accused, Joseph 'Joey' Wilson, Jr., will be sentenced to be put to death by electrocution.

"The other punishment that you may recommend is life in prison. If you do not believe that Joseph 'Joey' Wilson, Jr., should be put to death, you may recommend life imprisonment. The effect of that would be that the Court would sentence Joseph 'Joey' Wilson, Jr., to life imprisonment.

"Now gentlemen, even if you find beyond a reasonable doubt that the State of Georgia has proved the existence of the aggravating circumstance given to you in this charge, you nonetheless are not required to recommend that the defendant Wilson be put to death. You shall consider any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness, in mercy, shall be considered by you in fixing punishment.

"You may, if you see fit, and this is a matter entirely in your discretion, provide for a life sentence for the accused Wilson, based upon any mitigating circumstances, or reasons satisfactory to you, or without any reason, if you see fit to do so.

"You may recommend life imprisonment even though you have found the aggravating circumstance given to you in this charge to have existed beyond a reasonable doubt."

The defendant contends that the foregoing charge inadequately informed the jury as to the law on mitigating circumstances. He relies solely on the recent case of Spivey v. Zant, 661 F2d 464 (5th Cir., 1981), where the

Circuit Court found the charge approved in Spivey v. State, 241 Ga. 477 (246 SE2d 288) (1978), cert. denied, 439 U. S. 1039, to be inadequate.

The two leading cases in Georgia concerning the required jury instructions on mitigating circumstances in death penalty cases are Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977), and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977). In Fleming and Hawes, we held that it was error not to charge the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance. See Fleming v. State, supra, 240 Ga. 146-47; Hawes v. State, supra, 240 Ga. at 334-35. The sentencing instructions given the jury at the trial of this case comply with Fleming and Hawes.

In Spivey v. Zant, supra, the Fifth Circuit held that "[t]he eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, . . . but which also 'guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . .' Jurek v. Texas, 428 U. S. at 274, 96 SC at 2957. In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations." Spivey v. Zant, supra, 661 F2d at 471.

Applying this standard to the charge in the present case, we find no error. The jury was instructed as to the nature of mitigating circumstances and, that based on mitigating circumstances, they could recommend a life sentence even if they found the presence of a statutory

aggravating circumstance. This satisfies the constitutional requirements of Spivey v. Zant, supra.

6. In the final enumeration of error, the defendant argues that this court failed to carry out adequate review of the proportionality of his death sentence. See Wilson v. State, supra, 246 Ga. at 69-70.

In response to Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346) (1972), holding Georgia's death penalty statute unconstitutional, the General Assembly enacted Code Ann. § 27-2537, Ga. L. 1973, p. 159, 165. Section 27-2537 provides for automatic appeal to this court of all cases where the death penalty has been imposed and requires us to determine, inter alia: "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code Ann. § 27-2537(c). In connection with our proportionality review, we are also required to include with our opinion a reference to the "similar cases" considered in making the proportionality determination. Code Ann. § 27-2537(e).

In accordance with this mandate, we included with the opinion in the direct appeal of this case an appendix listing six "similar cases" in which the death penalty has been imposed.[12] The defendant challenges our proportionality review by contending that these six cases are not in fact "similar" to his. He states that in contrast with the facts of this case, in five of the cases cited in our appendix the elements of armed robbery and the

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[12]The six cases are: Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1976), cert. denied, 434 U. S. 935 (1977); Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978), cert. denied, 441 U. S. 967 (1979); Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978), cert. denied, 439 U. S. 1102; Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979), cert. denied, 444 U. S. 995; Hardy v. State, 245 Ga. 272 (264 SE2d 209) (1980), vacated, 449 U. S. 988, affirmed, 247 Ga. 235 (1981); Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980), cert. denied, 449 U. S. 938.

"core findings" of aggravating circumstance b(7) [the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Code Ann. § 27-2534.1(b)(7)] were present. Thus, the defendant argues that because these cases contain factors "vastly more reprehensible" than those in his case, his death sentence is disproportionate. (Lamentably we have come to think of some malice murders as more reprehensible than others.) He points out that in some of the six "similar cases" the defendants murdered strangers. He argues that in some of the six cases the victims pled for their lives. He notes that the appendices in the six cases do not always cite the same cases and he concludes that there are no cases similar to his.

We disagree. Rarely, if ever, will the facts surrounding two capital felony cases be exactly alike and we are not required to find identical cases for comparison in our proportionality review. Instead, we must determine whether the defendant's sentence of death is excessive in comparison to the sentences imposed in "similar cases" upon "similarly situated defendants". See Gregg v. Georgia, 428 U. S. 153, 198 (96 SC 2909, 49 LE2d 859) (1976); Code Ann. § 27-2537(c)(3).

Just as here, in each of the cases cited in our appendix to the direct appeal the victim was abducted at gunpoint, taken to a remote area, and cold-bloodedly murdered. In a majority of the cited cases, the victim was killed with a shotgun. As we stated on the appeal, these cases are "similar" to the case at hand because they "show that juries are not unwilling to impose the penalty of death for murder where the victim has been kidnapped and deliberately put to death." Wilson v. State, supra, 246 Ga. at 69. The fact that in some cases a defendant guilty of a deliberate abduction-murder does not receive the death penalty does not

invalidate the death sentences imposed on other defendants. Gregg v. Georgia, supra, 428 U. S. at 199. We therefore find this enumeration to be without merit.

The habeas court did not err in denying relief for any reason assigned.

Judgment affirmed. All the Justices concur.

Supreme Court of the United States

No. A-41

JOSEPH WILSON, JR.,

Petitioner

v.

WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(~~x~~),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 15, 19 82

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 16th day of July, 19 82

38278

SUPREME COURT OF GEORGIA

ATLANTA, May 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

XXXXXXXXXXXXXXXXXXXXXX

By Hill, P.J.

The following direction was given:

JOSEPH WILSON, JR. V. WALTER D. ZANT, WARDEN

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on 5-18-82 such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that Court.

Harold N. Hill, Jr., Presiding Justice

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

XXXXXXXXXXXXXXXXXXXX

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOSEPH WILSON, JR.,	:	
PETITIONER	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5064
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Forsyth County. Petitioner was convicted of Murder, Kidnapping with Bodily Injury, and Possession of a Firearm during Commission of a Felony. He was sentenced to death for the murder, to life imprisonment for the kidnapping, and to five years for possession of the firearm. His convictions and sentences were affirmed by the Supreme Court. Wilson v. State, 246 Ga. 62 (1980). The United States Supreme Court denied certiorari.

The Petition contains 32 numbered paragraphs, of which 23 allege substantive claims for relief (9-31). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs

in the Petition.

The record in this case consists of the transcript of the proceedings before this Court on June 9, 1981, and the transcript and record of Petitioner's trial in the Forsyth County Superior Court.

9.

In paragraph 9, Petitioner claims that the introduction at trial of his statements made to law enforcement officers violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was arrested at his home on February 27, 1979, by officers of Gwinnett and Forsyth Counties and given his Miranda warnings. (H.T. 7; T.T. 448-452). He was taken to the Forsyth County Sheriff's Department where he was again given his Miranda warnings. (T.T. 451). The investigating officer, Sergeant Adams, read the questions on the waiver of rights form, wrote Petitioner's answers on the form, and then Petitioner signed the form. (T.T. 452). Petitioner consented to give a statement and to allow the interview to be taped. (T.T. 454-455). The interview ended at Petitioner's request. (T.T. 462-463).

At trial, a Jackson-Denno hearing was conducted to determine the admissibility of Petitioner's statements

to Forsyth County law officers. (T.T. 449-499). Sergeant Adams testified that Petitioner did not request to talk to an attorney or to have anyone present during the interview. (T.T. 462-463). Petitioner testified that he did request to have an attorney present before he made any statements. (T.T. 477). The trial court ruled that Petitioner's statement was "knowingly, freely, willingly, and voluntarily made." (T.T. 499).

In the presence of the jury, Sergeant Adams testified as to the circumstances surrounding Petitioner's arrest and statement. (T.T. 510). When again asked if Petitioner asked for an attorney, the Sergeant responded:

> "No sir. He did acknowledge that he desired an attorney, somewhere during the course of my arresting him and having him at the jail, but when I questioned him about giving any statement to me, he was very voluntary to give a statement without an attorney or anyone else being present."
>
> (T.T. 516-517).

Sergeant Adams testified that in the interview Petitioner denied any complicity in the matter and gave an account of his activities the night the victim was abducted. (T.T. 520-532).

Petitioner's testimony at trial was essentially the same as his statements to police. (T.T. 979). He

offered two witnesses, his wife and daughter, to corroborate his story. (T.T. 884; 1039).

CONCLUSIONS OF LAW

The issue presented is whether the admission by the Court of portions of Petitoner's statement violated his Fifth and Fourteenth Amendment rights against self-incrimination.

The recent case of Edwards v. Arizona, ____ U.S.____, 68 L.Ed.2d 378 (1980), held that, where an accused has invoked his right to counsel, a valid waiver of that right cannot be established by showing only that he responded to police-initiated interrogation after being again advised of his rights.

In this case, Petitioner requested a lawyer and was subsequently interrogated at the instance of the police. The officer who arrested Petitioner and who taped the interview testified that at some point between the arrest and the interview Petitioner requested an attorney. Therefore, it is clear that the officer took the taped statement after Petitioner had requested counsel.

The trial court, therefore, did commit error in admitting Petitioner's statement. It was taken in violation of the Fifth and Fourteenth rights of Petitioner under the authority of Edwards v. Arizona, supra.

However, the Court rules that the error was harmless. Petitioner's statement to police was not

a confession and was used only for impeachment purposes.

Petitioner contends his statement was used to develop evidence, namely, to procure certain witnesses and a toy gun.

Petitioner's claim about the witnesses is not true. Sergeant Adams had already talked with these witnesses[1] before arresting Petitioner. In fact, their statements led the investigator to Petitioner. After the interview with Petitioner, Sergeant Adams went back and obtained their sworn statements. (T.T. 523-531). These witnesses testified at trial.

It is true the toy gun, introduced as State's Exhibit 9, was obtained as a result of the interview. When asked if he had carried a gun the night the victim was killed, Petitioner claimed to have carried this toy gun because it looked like a rifle and consented to the officer obtaining the gun without a search warrant. (T.T. 490-491). Petitioner's wife brought the gun to the Sheriff's Department the day after the interview. Id. At trial, the gun was used for impeachment purposes. When shown to witnesses who had seen Petitioner that night, they replied

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[1] These certain witnesses are: Patty Johnson, David Burns and Kenneth Burns who were present when the victim was abducted from Ms. Johnson's house; and Glennis Abee and Alma Johnson who earlier that evening had heard Petitioner threaten to blow the victim away.

that it was not the gun they had seen in Petitioner's possession. (T.T. 615; 768; 809).

The admission of the taped statement, while erroneous under Edwards v. Arizona, supra, was only used for impeachment purposes. The Court finds beyond a reasonable doubt that the erroneously admitted statement in all likelihood did not contribute to the verdict of guilty or the imposition of the death penalty. For this reason, the Court rules that the conviction should not be set aside.

10.

The allegation in paragraph 10 has already been decided adversely to Petitioner. Wilson v. State, supra, at 66(2).

11.

The allegation raised in paragraph 11 was waived. (H.T. 23).

12.

The allegation concerning ineffective assistance of counsel was abandoned. (H.T. 52-55).

13.

In paragraph 13, Petitioner claims his constitutional rights were violated by the prosecutor's closing arguments in both the guilt/innocence and sentencing phases of trial.

The arguments raised in 13(d), (e), and (f) were decided adversely to Petitioner on direct appeal. Wilson v. State, supra, at 67-68.

Petitioner's remaining supported allegation charges that the law permitting the prosecutor to comment to the jury upon Petitioner's failure to produce witnesses,[2] while denying Petitioner the opportunity to comment on the State's failure to produce witnesses, violates due process. The Court finds this argument to be without merit.

14.

The Supreme Court has already concluded the evidence was sufficient to support Petitioner's conviction. Wilson v. State, supra, at 63.

15.

In paragraph 15, Petitioner claims the jury charge on malice and intent was impermissibly burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

FINDINGS OF FACT

In the guilt/innocence phase, the trial judge instructed the jury on the presumption of innocence (T.T. 1191, 1192); on the burden on the State to prove each and every element of the offense (T.T. 1191, 1192, 1202); and, specifically, that the element of intent must be proved by the State beyond a reasonable doubt. (T.T. 1198).

The trial judge also read the statutory definition of murder, defined and expounded upon the element of malice, and specifically charged that malice, either

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[2] Cf. Conteras v. State, 242 Ga. 369 (3) (1978); Shirley v. State, 245 Ga. 616, 618 (1980).

express or implied, must be proved beyond a reasonable doubt. (T.T. 1193-1194).

CONCLUSIONS OF LAW

A jury charge must always be viewed as a whole. Patterson v. State, 239 Ga. 409, 415 (1977); Thomas v. State, 240 Ga. 454 (1978).

Petitioner has isolated the portion of the charge on implied malice to allege that it is burden-shifting. However, the Supreme Court has previously rejected this argument in Thomas v. State, supra, at 455.

Furthermore, when viewed as a whole, a reasonable juror could not have interpreted the charge as either conclusive or burden-shifting. County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

Accordingly, this claim for relief is found to be without merit.

16.

The unsupported allegation as to the introduction in the sentencing phase of Petitioner's prior convictions is deemed abandoned.

17.

The allegation in paragraph 17 has already been decided adversely to Petitioner. Wilson v. State, supra at 64.

18.

The claim raised in paragraph 18 has already been decided adversely to Petitioner on appeal. Wilson v. State, supra at 67.

19., 20.

In paragraphs 19 and 20, Petitioner claims he was indicted and convicted by unconstitutionally composed grand and traverse jurors.

Petitioner has presented no proof on the issue. Accordingly, the allegations in paragraphs 19 and 20 are found to be without merit.

21.

In paragraph 21, Petitioner contends his constitutional rights were violated by the introduction into evidence of a taped conversation between Petitioner's wife and a "bugged" witness.

FINDINGS OF FACT

The conversation in question occurred between Petitioner's wife and the victim's girlfriend, Patty Johnson, in March, after Petitioner's arrest in February, at Ms. Johnson's house. (T.T. 929-930). Ms. Johnson testified that she voluntarily wore the electronic transmitting device. Id.

CONCLUSIONS OF LAW

Ga. Code Ann. §26-3001 does not prohibit one party to a conversation from secretly recording or

transmitting it without the knowledge or consent of the other party. State v. Birge, 240 Ga. 501 (1978).

Accordingly, the allegation in paragraph 21 is found to be without merit.

22., 23., 24., 25.

In Counts 22-25, Petitioner contends his death sentence for murder must be set aside because his contemporaneous conviction for possession of a deadly weapon during commission of a felony constitutes double jeopardy in violation of his Fifth and Fourteenth Amendment rights.

FINDINGS OF FACT

Defendant was indicted and convicted of malice murder (R.7-8) and for possession of a deadly weapon during commission of a felony (R.7-8). There was evidence tending to establish that the weapon possessed was the same weapon used to kill the victim. (T. 613-614; 728-729; 766; 809; 871).

CONCLUSIONS OF LAW

Because the weapon possessed was the same one used in the commission of the murder, the offense of possessing the deadly weapon during commission of a felony (the murder) would be an included offense under Ga. Code Ann. §26-506, and Petitioner cannot be convicted and sentenced for both the greater and the lesser offenses. State v. Estevez, 232 Ga. 316 (1974).

But Petitioner is mistaken in his hope that this causes a reversal of his conviction for murder and the imposition of the death penalty. To the contrary, it is the lesser included offense and the punishment therefor which must be set aside. High v. State, 247 Ga. 289, 294 (12) (1981); Chumley v. State, 235 Ga. 540, 541 (2) (1975); Roberts v. The State, 228 Ga. 298, 300 (2) (1971).

Accordingly, the conviction and sentence for possession of a deadly weapon during commission of a felony must be set aside. The conviction and sentence for murder are not affected.

26., 27., 28.

In paragraph 26, 27, and 28, Petitioner makes a sweeping attack against the constitutionality of the death penalty statute in theory and application.

In that Petitioner has presented no proof on these issues, the allegations in paragraphs 26, 27, and 28 are found to be without merit.

29.

The Supreme Court has already conducted a sentence review and concluded Petitioner's death sentence was neither excessive nor disproportionate considering the crime and the defendant. Wilson v. State, supra at 69.

30.

The Supreme Court has already concluded that Petitioner's sentence of death was not imposed under

the influence of passion, prejudice or other arbitrary factor. Wilson v. State, supra at 68.

31.

In paragraph 31, Petitioner claims that the jury charge in the sentencing phase was erroneous and deprived him of his Eighth and Fourtheenth Amendment protections.

FINDINGS OF FACT

The trial court instructed the jury that the State had the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. (T.T. 1214). The jury was told that if they found an aggravating circumstance they were not required to recommend a death sentence. (T.T. 1315-1316). The jury was told to consider any mitigating circumstances, which were defined as "those circumstances which in fairness, in mercy, shall be considered by you in fixing punishment." (T.T. 1316). The jury was also told they could, as a matter entirely within their discretion, recommend life, "based upon any mitigating circumstances, or reasons satisfactory to you, or without any reason, if you see fit to do so." Id.

CONCLUSIONS OF LAW

There is no requirement that a jury be instructed that mitigating circumstances are to be weighed against aggravating circumstances. Spivey v. State, 241 Ga.

477 (1978); Gates v. State, 244 Ga. 587 (1979).

The jury was instructed to consider the facts and circumstances in aggravation and mitigation and that they could recommend life even if they found the existence of an aggravating circumstance. The jury was properly instructed as to what to consider in reaching its decision as to sentence. Fleming v. State, 240 Ga. 142 (1977); Hawes v. State, 240 Ga. 327 (1977); Spivey v. State, supra; Gates v. State, supra.

Accordingly, this claim for relief is found to be without merit.

WHEREFORE, the Petition is granted as to the conviction and sentence for possession of a deadly weapon during commission of a felony. This conviction and sentence are set aside.

As to the murder conviction and the imposition of the death penalty and as to all other issues raised, the Petition for Habeas Corpus is found to be without merit and is denied.

This 25th of September, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

82 5567

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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JOSEPH WILSON, JR.,

PETITIONER

V.

WALTER D. ZANT, SUPT.,

RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Joseph Wilson, Jr., moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with this petition for writ of certiorari to the Supreme Court of Georgia from the judgment entered in this cause on April 21, 1982, pursuant to 28USC §1915, and Rule 46 of the rules of this Court, and in support thereof attaches the affidavit of Petitioner.

Jurisdictional statement is being filed with this motion and affidavit.

Bruce S. Harvey
Counsel for Petitioner
3349 Piedmont Rd., N. E.
Piedmont West, Suite 203
Atlanta, Georgia 30305

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, BRUCE S. HARVEY, being first duly sworn, depose and say that I am the duly authorized attorney for JOSEPH WILSON, JR., Petitioner herein, authorized to prepare and verify the within and foregoing Petitioner. I know of my own personal knowledge that the facts contained herein are true and correct; and I signed this affidavit on behalf of Petitioner for the reason that Petitioner is located at Georgia Department and Classification Center at Jackson, Georgia and there is insufficient time to secure this personal affidavit.

Petitioner is not presently employed, nor has he had any income from a business or profession or any other source within the last twelve months. Petitioner owns no property of any king, either real or personal, outside of personal possessions. Petitioner has a prison checking account with a current balance of THREE ($3.00) DOLLARS.

FURTHER AFFIANT SAYETH NOT

Bruce S. Harvey

Sworn to and subscribed before
me this 14 day of October, 1982.

Millard Farmer
NOTARY PUBLIC